Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

MACDONALD LETTER SERVICE , INC.,
Petitioner

v.

MICHAEL MARSHALL, SECRETARY OF THE IOWA SENATE AND MARGARET THOMSON, CHIEF CLERK OF THE IOWA HOUSE OF REPRESENTATIVES,
Respondents

On Petition For Writ Of Certiorari
To The Supreme Court of Iowa

PETITION FOR WRIT OF CERTIORARI

TERRANCE E. SWANSON
Counsel of Record
SWANSON LAW OFFICE
520 35TH STREET
DES MOINES, IOWA 50312
515-274-8679

Questions Presented for Review

Petitioner was denied standing to pursue its action in Equity upon Respondents Motion to Dismiss. The District Court's order granting dismissal was affirmed on appeal. Request for Further Review was denied by the Supreme Court of Iowa.

Questions for Review:

Is it contrary to the First and Fourteenth Amendments to the U.S. Constitution for a State Court to deny standing to sue ***in Equity*** to a party who is a qualified winning bidder in a public competitive bidding process but was not awarded the contract?

Is the granting of a Motion to Dismiss ***in an Equity action*** simply because the Petitioner is an unsuccessful bidder in a public bidding process, an unconstitutional denial of Due Process and the right to petition the government for redress of grievances?

PARTIES TO THE PROCEEDINGS

All parties to this case are listed on the cover of this petition.

MacDonald Letter Service, Inc. is a Corporation organized under the Laws of the State of Iowa and is family owned and has no parent company nor is it part of any holding company.

Opinions and Orders Entered by the Courts in this Case*

10 March '03	Order Granting Motion to Dismiss	Iowa District Court for Polk County - Judge Sherman Phipps
12 June '03	Expanded Opinion re: Granting State's Motion	Iowa District Court for Polk County - Judge Sherman Phipps
14 April '04	Order Affirming District Court's Granting of State's Motion to Dismiss	Court of Appeals of Iowa - Zimmer, Miller and Hecht
30 July '04	Order denying further review	Supreme Court of Iowa – Louis A. Lavarato, Chief Justice

*Presented in Appendix

I. Basis for Jurisdiction

a. The order sought to be reviewed in this petition was entered on April 14, 2004 by the Court of Appeals of Iowa.

b. Petitioner filed a timely Application for Further Review with the Supreme Court of Iowa.

c. Further review of the case was denied by the Supreme Court of Iowa by order entered on July 30, 2004.

d. Petitioner believes that the circumstances of this case has denied him due process of law and denied him the right to petition the Government of the State of Iowa for redress of grievances as provided for in the First and Fourteenth Amendment to the U.S. Constitution. Petitioner asserts that such denial of due process in this circumstance raises an important constitutional question pursuant to Supreme Court Rule 10(3).

e. Because the actions of the State Court are not based on statutory authority nor is the Petitioner's suit in Equity specifically based on a statutory provision; and because the Attorney General of the State of Iowa is the Attorney of record for respondent, no special notice is required pursuant to Supreme Court Rule 29.4.

II Case Statement

There are no facts in dispute in this case.

Case History Summary:

Petitioner is a family owned company in Des Moines, Iowa, that has been incorporated since 1960. Over the years it has successfully provided printing services to the Government of the State of Iowa and the general public including printing services to the Iowa Legislature substantially identical to the service contract in dispute.

In the Fall of 2002 the Respondents, on behalf of the State of Iowa Legislature, sent out a "Request For Bids" (RFB) for printing services to cover four or more legislative

sessions (four years). Petitioner, at some expense of time and materials, responded with a bid that was substantially under the "winning" bid. Upon learning the circumstances of the bid that "won", petitioner requested reconsideration. Upon rejection of that request, Petitioner filed suit in the Fifth Judicial District Court, Polk County Iowa.

Assistant Iowa Attorney General Grant Dugdale filed a Motion to Dismiss. After a hearing, at which no record was made, Judge Sherman W. Phipps granted the Motion to Dismiss. On March 19, 2003, Petitioner filed a timely Motion to Reconsider and Enlarge Findings. On June 12, 2003 the Court found Petitioner's motion appropriate and , essentially, reiterated its former ruling with some expanded discussion. On June 18, 2003 Petitioner filed a Notice of Appeal. On April 14, 2004 the Iowa Court of Appeals affirmed the District Court's Order granting Respondent's Motion to Dismiss.

Petitioner made timely Application for Further Review of the Court of Appeals of Iowa opinion. On July 30, 2004, the Supreme Court of Iowa denied Petitioner's Application for Further Review. This is the Court of Last Resort in the State of Iowa.

When the Federal Question was First Raised:

The constitutional question was first raised on Appeal after the State's Motion to Dismiss was granted. Although Iowa R. App. P. 6.4 requires that actions in equity be reviewed de novo, the Court of Appeals refused to review the constitutional question on Appeal. This is clear error.

As a matter of logic, the issue of denial of Due Process and the right to Petition the Government for Redress of Grievances does not arise until the Motion to Dismiss is granted. One could argue, hypothetically, that to grant the motion would deny Petitioner his Constitutional Right to Petition the Government for Redress of a Grievance but legal

precedent and scholarship seemed clear that the Motion would be denied. The issue became real and not hypothetical when the Court granted the motion. Thus the appeal petition was the first realistic opportunity to argue the issue.

The Basic Issue of Law and Equity:

Whether or not Petitioner should prevail on the merits is not yet at issue in this case. By granting the State's Motion to Dismiss, the District Court closed the doors of the Courthouse to Petitioner.

Petitioner readily concedes that, as an unsuccessful bidder in a public bidding process, he has no standing to bring an action ***at law***.

> "...another reason an unsuccessful bidder has no standing to seek monetary damages is that this would be contrary to the public interest the bidding laws were designed to protect, since it would twice penalize taxpayers by compelling them to pay not only the excess over what they would have paid if the contract were properly awarded, but also the amount of profit lost by the contractor whose bid was wrongfully rejected." Garling Construction, Inc. v City of Shellsburg, 641 N.W. 2nd 522-523 (Iowa 2002)

To bring an action in Equity when the bidding process stinks requires a certain element of public spirit and desire to set things aright. Equity brings no hope of money damages but merely a hope of future fairness. This was an

action in equity![1] It is not surprising that there is little or no precedent available on point.

The Court of Appeals stated "...our Supreme Court has concluded an unsuccessful bidder lacks standing to bring an action in equity." [Court of Appeals Opinion, pg 3, see Appendix] The cases cited in the ruling simply do not say what the Court of Appeals say they say. *Elview Const. Co., Inc. v. North Scott Community School Dist. 373 N.W.2d 138* and *Garling Construction, inc. v City of Shellsberg, 641 N.W. 2nd 522 (523-525) (Iowa 2002)*. Nowhere in these Actions at Law can we find any legal authority for the statement by the Court of Appeals quoted above. Nor would they constitute controlling legal authority if they did since neither are actions in Equity.

Reasons to Allow this Writ:

The Petitioner does not seek damages and the taxpayer can only benefit from requiring that abusive bureaucrats follow reasonable procedures once they have invoked them. We are simply asking the Courts to evaluate the merits of our case. We seek no specific remedy other than some type of reasonable and equitable relief that we believe is within the power of the Court to provide.

The Iowa Courts, by granting the State's Motion to Dismiss, have specifically refused to review this case in the light of the Constitutional Issues raised on Appeal.

It seems obvious to us that if Petitioner has no standing at Law [for understandable reasons] and has no standing in Equity (contrary to reason and logic) then Petitioner is,

---

[1] "Denial of standing to an unsuccessful bidder does not mean violation of a bidding statute will necessarily go unchallenged. **An injunction action, mandamus, or declaratory judgment might still be available.**" (emphasis added) *See* Annotation, 65 A.L.R.4th at 99

arguendo, denied any avenue to petition his government for redress of grievances contrary to the Constitution provisions cited. *U.S. Const. amend. I*[2] *and Iowa Const. art I § 20*[3].

These basic constitutional provisions permeate our legal system. The decision not to address the Constitutional issue by the Court of Appeals is bound up with the decision to ignore the fact that Petitioner has been denied any standing whatsoever despite considerable legal scholarship to the contrary. Restricting consideration of constitutional issues in this motion to dismiss an Equity case is error compounding error.

Petitioner respectfully requests the opportunity to be heard on the simple question; is the denial of standing to an unsuccessful bidder in a public bidding procedure in a ***Petition in Equity*** an unconstitutional denial of due process?

TERRANCE E. SWANSON
Counsel of Record
520 35TH STREET
DES MOINES, IOWA 50312
515-274-8679

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[2] Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

[3] Right of assemblage--petition. SEC. 20. The people have the right freely to assemble together to counsel for the common good; to make known their opinions to their representatives and to petition for a redress of grievances.

(2)
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APPENDIX

TERRANCE E. SWANSON
Counsel of Record
SWANSON LAW OFFICE
520 35TH STREET
DES MOINES, IOWA 50312
515-274-8679

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I U.S. Constitution, amendment 1.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

II. U.S. Constitution, amendment 14.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

1. Section 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, **and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.**

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the

enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

III. Iowa Constitution, Article 1 § 20.

The people have the right freely to assemble together to counsel for the common good; to make known their opinions to their representatives and to petition for a redress of grievances.

IV Iowa District Court for Polk County -Judge Sherman Phipps - RULING ON DEFENDANT'S MOTION TO DISMISS

IN THE IOWA DISTRICT COURT FOR POLK COUNTY
Case No. CL91651
Filed March 10, 2003

Defendants' Motion to Dismiss comes on for hearing this date. The Court having reviewed the file, pleadings, and briefs herein and having heard the arguments of counsel for the parties finds as follows:

1. The Court has jurisdiction of the parties and the subject matter herein.

2. The Plaintiff, as a unsuccessful bidder in the bidding process used by the Iowa Senate and Iowa House of Representatives to procure printing services, does not have standing to bring this action. *Garling Construction, Inc. V. City of Shellsburg,* 641 N.W. 2nd 522, 523-524 (Iowa 2002)

3. Plaintiff in its application for writ of mandamus is asking the Court to establish rights rather than to enforce a right of the Plaintiff. Plaintiff also acknowledges the existence of Defendants' discretion as it relates to the bidding process (see Exhibit D., paragraph 4 attached to Plaintiff's petition). Mandamus is therefore not an appropriate remedy. *Hewit v Ryan*, 356 N.W. 2nd 230,233 (Iowa 1984)

WHEREFORE Defendants' Motion to Dismiss is GRANTED.

DATED THIS 7TH day of March, 2003.
/s/ SHERMAN W. PHIPPS, JUDGE
FIFTH JUDICIAL DISTRICT OF IOWA

V. Iowa District Court for Polk County -Judge Sherman Phipps - Order and Opinion Granting State's Motion to Dismiss - Expanded

IN THE IOWA DISTRICT COURT FOR POLK COUNTY
Case No. CL91651
Filed March 10, 2003
RULING

Plaintiff's Motion to Reconsider Ruling on Defendant's Motion to Dismiss and Enlarge Findings and Conclusions came before the Court on May 8, 2003. The Court having reviewed the file, pleadings, and briefs herein and having heard the arguments of counsel for the parties finds as follows:

1. The Court has jurisdiction of the parties and the subject matter herein.

2. It is appropriate for the Court to enlarge on its findings and conclusions as set forth in its ruling on Defendant's Motion to Dismiss (hereinafter "the Ruling" entered herein on March 10, 2003.

3. In paragraph 2 of the Ruling, the Court stated "The Plaintiff, as a unsuccessful bidder in the bidding process used by the Iowa Senate and Iowa House of Representatives to procure printing services, does not have standing to bring this action. *Garling Construction, Inc. V. City of Shellsburg,* 641 N.W. 2nd 522, 523-524 (Iowa 2002)"

4. As pointed out in Brief in Support of Plaintiff's Resistance to Defendant's Motion to Dismiss, the Iowa Court in *Garling* at page 524 did go on to say "Denial of standing to an unsuccessful bidder does not mean violation of a bidding statute will necessarily go unchallenged. An injunction action, mandamus or declaratory judgement might still be available."

5. The remedies requested by Plaintiff (page 6, Plaintiff's Petition) included a request for a temporary injunction and, further, a request for a writ of mandamus for the reasons set forth in the final two paragraphs of Plaintiff's

Petition.

6. Plaintiff's request for injunctive relief was withdrawn in the case in writing on January 16, 2003 (Motion to Withdraw Request for Temporary Injunction).

7. The only remaining remedy requested by Plaintiff in its Petition was issuance of a writ of Mandamus, "mandating that they [the Defendants] withdraw the award of the printing contract..."

8. This Court addressed the Plaintiff's request for a writ of mandamus in paragraph 3 of the Ruling. That paragraph is expanded by adding thereto the following: "Principles governing mandamus are well established. It is a drastic remedy to be applied only in exceptional circumstances. It is not to be used to establish rights but to enforce rights that have already been established." *Stith v Civil Service Commission of Des Moines*, 159 N.W.2nd 806,808 (Iowa 1968). "The writ can be used to compel a tribunal to act but cannot control its discretion." *Hewitt. Ryan*, 356 N.W.2nd 230, 233 (Iowa 1984)0. The Plaintiff now argues that this Court has no basis for its conclusion that "Plaintiff...is asking the Court to establish rights rather than enforce a right of the Plaintiff," Plaintiff takes the position that such a conclusion cannot be reached without "..litigation and a fair hearing on the issue" (page 2 of Plaintiff's Motion to Reconsider Ruling on Defendants' Motion to Dismiss and Enlarge Findings and Conclusions).

9. Plaintiff's pleadings fail to recite the violation of any specific rights of the plaintiff. The Plaintiff does not claim that Defendants have failed to comply with any statutory requirements or even any specific written procurement rules. Plaintiff acknowledges (Page1, Brief in Support of Plaintiff's Resistence to Defendant's Motion to Dismiss) that it "...does not challenge the bidding process per se...".

10.Plaintiff's own pleadings establish that the Plaintiff's intent in bringing this suit is in fact to challenge th-

Defendant's exercise of Discretionary powers (see line 1, page 6 of Brief in Support of Plaintiff's Resistence to Defendant's Motion to Dismiss; paragraph 21, page 6 of Petition, opening paragraph in Plaintiff's Petition.

11. Plaintiff's own pleadings make it clear that the request for mandamus in this case is a request that the Court (a) compel the Defendant's to establish rights on its behalf and (b) interfere with the Defendant's discretionary powers rather than a request to enforce any rights already established for the Plaintiff.

12. Writ of mandamus, the only relief still requested in Plaintiff's pleading at the time of the Court's ruling on March 10, 2003, is not a remedy available to the Plaintiff in this case.

WHEREFORE, for the reasons set forth in the Court's ruling of march 10, 2003, and for the reasons set forth herein, Defendants' Motion to Dismiss is GRANTED. Costs hereof are assessed to the Plaintiff.

DATED this 15th day of May, 2003.

/s/ SHERMAN W. PHIPPS, JUDGE
Fifth Judicial District of Iowa

VI. Court of Appeals of Iowa - Order and Opinion Affirming District Court Order *NOTE: It is this Ruling that is sought to be reviewed.*

IN THE COURT OF APPEALS OF IOWA
No. 4-118 / 03-1006
Filed April 14, 2004
MACDONALD LETTER SERVICE, INC.
Plaintiff-Appellant,
vs.
MICHAEL MARSHALL, SECRETARY OF THE IOWA SENATE, and MARGARET THOMPSON, CHIEF CLERK OF THE IOWA HOUSE OF REPRESENTATIVES,
Defendants-Appellees.

Appeal from the Iowa District Court for Polk COUNTY, Sherman W. Phipps, Judge.

MacDonald Letter Service, Inc. Appeals from the district court's grant of defendant's motion to dismiss. AFFIRMED.

Terrance Swanson and Dallas Janssen, Des Moines, for appellant.

Thomas J. Miller, Attorney General, and Grant Dugdale, Assistant Attorney General.

Considered by Zimmer, P.J. and Miller and Hecht, JJ.

HECHT, J.

MacDonald Letter Service, Inc. (MacDonald) appeals from the district court's grant of the defendant's motion to dismiss. We affirm.

Background Facts and Proceedings.

In December 2002, MacDonald submitted a bid for the 2003-2006 Iowa legislative printing contract. Although MacDonald's was the lowest of the four bids submitted,

Michael Marshall, Secretary of the Iowa Senate and Margaret Thompson, Chief Clerk of the Iowa House of Representatives, awarded the contract to Garner Printing.

On January 10, 2003, MacDonald file suit requesting "equitable relief from the arbitrary and capricious and excessively expensive exercise of the administrative discretion by [Marshall and Thompson] in the awarding of a contract for printing services." Specifically, MacDonald requested an injunction preventing Marshall and Thompson form entering into the contract with Garner Printing. Additionally, MacDonald requested a writ of Mandamus requiring the defendant''s to award the contract to MacDonald. MacDonald subsequently withdrew its request for a temporary injunction and Marshall and Thompson filed a motion to dismiss. The district court granted the motion, concluding MacDonald, as an unsuccessful bidder on a government contract did not have standing to challenge the bidding process. The district court further concluded that a writ of mandamus was not an appropriate remedy in MacDonald's action.

MacDonald filed a motion to reconsider and enlarge. After a hearing, the district court enlarged its findings, but again dismissed MacDonald's action. MacDonald appeals, alleging (1) an unsuccessful bidder on a government contract does have standing in Equity to challenge the bidding process; (2) a writ of mandamus is an appropriate remedy under the circumstances of this case; and (3) dismissal of its claim violates its rights under the Iowa and the United States constitutions.

Standard of Review and Error Preservation.

Although we normally review actions in equity de novo, Iowa R. App. P. 6.4, we review decisions on motions to dismiss for errors at law. *Barkema v. Williams Pipeline Co.* 666 N.W. 2nd 612, 614 (Iowa 2003). Because MacDonald failed to argue to the district court that the dismissal of its claim violates its rights under the Iowa and the United States constitutions, we

will not address this argument for the first time on appeal. *Kroblin v RDR Motels, Inc.* 347 N.W. 2nd 430, 434 (Iowa 1984).

While conceding it does not have standing at law, MacDonald contends Iowa law permits an unsuccessful bidder to challenge the bidding process in equity.

However, our supreme court has concluded an unsuccessful bidder lacks standing to bring an action in equity. *Elview Constr. Co. V. North Scott Comm. Sch. Dist.*, 373 N.W. 2nd 138, 141 (Iowa 1985) "The reasoning for Elview's standing decision is that the truly damaged party is the taxpayer, not the one who has lost a bid through some claimed error." *Garling Construction, Inc. V. City of Shellsburg,* 641 N.W. 2nd 522, 523-524 (Iowa 2002).

MacDonald relies on language in Garling noting that while an unsuccessful bidder does not have a cause of action at law, " [a]n injunction, mandamus, or declaratory judgement might still be available." Id. At 524. MacDonald urges us to conclude that this language in *Garling* indicates our supreme court intended to make available actions in equity for unsuccessful bidders. However, we conclude our supreme court, in *Garling*, reaffirmed the holding in Elview precluding suits in equity by unsuccessful bidders, despite the dicta regarding the possible availability of injunctions, writs of mandamus, or declaratory judgements. Accordingly, we affirm the district court's dismissal of MacDonald's cause of action.

Writ of Mandamus.

A writ of mandamus is a drastic remedy which is not used to establish rights but rather to enforce rights that already exist. *Hewitt v. Ryan*, 356 N.W. 2nd 230, 233 (Iowa 1984); *Stith v Civil Service Commission of Des Moines*, 159 N.W.2nd 806,808 (Iowa 1968). We agree with the district court's conclusion that MacDonald is both asking the court to establish rights rather than enforce rights that already exist and control the exercise of discretion of an inferior tribunal. Accordingly,

we conclude a writ of mandamus is unavailable under these circumstances and affirm.
AFFIRMED.

VII. Supreme Court of Iowa - Order

IN THE SUPREME COURT OF IOWA
No. 03-1006
Polk County No. CL91651
MACDONALD LETTER SERVICE, INC.
Plaintiff-Appellant,
vs.
MICHAEL MARSHALL, SECRETARY OF THE IOWA SENATE, and MARGARET THOMPSON, CHIEF CLERK OF THE IOWA HOUSE OF REPRESENTATIVES,
Defendants-Appellees.

After consideration by this court en banc, further review of the above captioned case is denied.

Dated this 30th Day of July, 2004.

THE SUPREME COURT OF IOWA

/s/ Louis A. Lavorato, Chief Justice

TERRANCE E. SWANSON
Counsel of Record
520 35TH STREET
DES MOINES, IOWA 50312
515-274-8679

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